ATTORNEY FOR APPELLANT:

DAVID W. STONE, IV
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

J.T. WHITEHEAD
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JUSTIN N. SHINABARGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A05-0612-CR-700
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0603-FB-87

May 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Justin Shinabarger appeals the trial court's order sentencing him to an aggregate sentence of twenty-four years for Escape, as a Class C Felony, and Carjacking, as a Class B felony, following a guilty plea. Shinabarger raises two issues on appeal:

1. Whether the trial court improperly identified the crime of escape as an aggravating factor and erred in not identifying mitigators when determining his sentence.

2. Whether the sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 10, 2005, the State booked Shinabarger into the Madison County Jail for pre-trial detention on two charges of robbery, one charge of burglary, and one charge of theft. On February 24, 2006, Shinabarger and two others escaped from the jail by removing blocks from the inner wall of the facility and bricks from the outer wall of the facility. Shinabarger and the two others then used sheets to climb down through the holes they had created. Shortly after escaping, Shinabarger committed a carjacking when he demanded that a couple drive him to a specified location. Shinabarger then forced the couple out of the car in a remote location and drove away.

Shinabarger was rearrested the following morning after police received a call from a woman who claimed he was banging on her window. When police arrived, they found Shinabarger in a nearby shed. He was arrested and charged with escape and carjacking, in addition to the pending robbery, burglary, and theft charges.

On June 8, 2006, the day Shinabarger's jury trial was to begin, he pleaded guilty to the charges of escape and carjacking without a plea agreement. In sentencing Shinabarger on the carjacking conviction, the court identified two aggravating circumstances: his "extensive criminal history" and his escape from incarceration. Transcript at 41. The trial court also analogized the nature of the carjacking to kidnapping.

The trial court did not identify any mitigating circumstances, although Shinabarger asked the court to consider his remorse and that he was trying to see his daughter on her first birthday when he escaped from jail. In his statement to the court, Shinabarger said in relevant part:

> When I was in detention in Madison County and when I did all this, a lot of things were happening and going through my head. I was going through a bunch of situations actually kind of personal. I don't think I've ever become more sincere I mean about everything that's happened. I do apologize for everything I've put everybody through . . . I don't really have an excuse why I did it. I was reacting. All I thought about was my daughter's first birthday and how much I messed up and I guess I just . . . I was willing to do everything and anything to get to her, but I kind of did it in the wrong way . . . I mean at the moment of everything that happened, I wasn't even thinking straight. I didn't have my head on right. I was just kind of dazed and confused, but as a bunch of people have said, if they could take it all back, they would.

Transcript at 27-28. The trial court then sentenced Shinabarger to the maximum of twenty years for the carjacking and to the advisory sentence of four years for escape. The trial court ordered those sentences to run consecutively. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Aggravating and Mitigating Factors

Shinabarger first contends that the trial court improperly identified aggravating and mitigating factors. The standard of review for a sentence imposed under the advisory statutory scheme,[1] when the trial court has identified aggravating and mitigating factors, is uncertain. This court has noted:

> [The] after effects [of Blakely v. Washington, 542 U.S. 296 (2004),] are still felt because the new [advisory sentencing] statutes raise a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old "presumptive" sentencing scheme is unclear.
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> We attempted to address these questions in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), trans. granted. We observed that under the current version of Indiana Code Section 35-38-1-7(d), trial courts may impose any sentence that is statutorily and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." [Anglemeyer, 845 N.E.2d] at 1090. We also noted, however, that Indiana Code Section 35-38-1-3(3) still requires "a statement of the court's reasons for selecting the sentence it imposes" if a trial court finds aggravating or mitigating circumstances. Id. In attempting to reconcile the language, we concluded that any possible error in a trial court's sentencing statement under the new "advisory" sentencing scheme necessarily would be harmless. Id. at 1091. Therefore, we declined to review Anglemeyer's challenges to the correctness of the trial court's sentencing statement. Id. Nevertheless, we stated, "oftentimes a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court

[1] As the escape and carjacking each occurred after the effective date of the advisory sentencing statutes, those statutes apply to Shinabarger's sentence. See Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006). The advisory sentence for a Class B felony is ten years, and the advisory sentence for a Class C felony is four years. Ind. Code §§ 35-50-2-5, -6.

> judge who crafted a particular sentence" and encouraged trial courts to continue issuing detailed sentencing statements to aid in our review of sentences under Indiana Appellate Rule 7(B). Id.
>
> Our attempt in Anglemeyer to analyze how appellate review of sentences imposed under the "advisory" scheme should proceed was met with a swift grant of transfer by our supreme court. Until that court issues an opinion in Anglemeyer, we will assume that it is necessary to assess the accuracy of a trial court's sentencing statement if, as here, the trial court issued one, according to the standards developed under the "presumptive" sentencing system, while keeping in mind that the trial court had "discretion" to impose any sentence within the statutory range for the [felony level of each conviction] "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." See Ind. Code § 35-38-1-7.1(d); see also Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) ("a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.") [,trans. denied]. We will assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate. In other words, even if it would not have been possible for the trial court to have abused its discretion in sentencing [a defendant] because of any purported error in the sentencing statement, it is clear we still may exercise our authority under Article 7, Section 6 of the Indiana Constitution and Indiana Appellate Rule 7(B) to revise a sentence we conclude is inappropriate in light of the nature of the offense and the character of the offender. See Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006); see also Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002) (holding that Indiana Constitution permits independent appellate review and revision of a sentence even if a trial court "acted within its lawful discretion in determining a sentence").
>
> In reviewing a sentencing statement, "we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings." Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002).

Gibson v. State, 856 N.E.2d at146-47 (emphasis added).

Without further guidance from our supreme court, we apply the abuse of discretion standard described in Gibson. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or

if the trial court has misrepresented the law. Id. at 147. "Because reasonable minds may differ due to the subjectivity of the sentencing process, it is generally inappropriate for us to merely substitute our opinions for those of the trial judge." Corbett v. State, 764 N.E.2d at 630 (citations omitted).

Shinabarger argues that the trial court incorrectly identified escape as an aggravating factor in enhancing his sentence on the escape conviction.[2] See Stewart v. State, 531 N.E.2d 1147, 1150 (Ind. 1988). But the trial court sentenced Shinabarger to the advisory sentence of four years for the crime of escape. Thus, when the trial court addressed aggravating circumstances it was in reference only to the enhanced sentence for carjacking. Escape is not a material element of the crime of carjacking, so the trial court did not abuse its discretion in using escape as an aggravating circumstance. See Ind. Code § 35-44-3-5 (2004) (defining "escape"); O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001) (holding that multiple crimes or victims constitutes a valid aggravating circumstance).

Shinabarger also asserts that the trial court should have identified his guilty plea and remorse as mitigating circumstances. But the court is only required to identify mitigators that are significant. See Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006) (citation omitted). "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." Id. The determination of whether a

[2] Shinabarger does not contend that the use of his escape was an improper aggravator for his sentence on the carjacking conviction.

mitigator is significant is within the sound discretion of the trial court and the court is not required to place the same value on a mitigating circumstance as does the defendant. Id.

Here, Shinabarger does not establish that either of his proposed mitigators is significant. Regarding Shinabarger's guilty plea specifically, when an individual "does not advance to the trial court that his decision to plead guilty should be considered a mitigating circumstance [the] issue is waived." Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans denied (citations omitted). Shinabarger did not ask the trial court to consider his guilty plea as a mitigating circumstance. Hence, the issue is waived. Waiver notwithstanding, Shinabarger's guilty plea is not significant since he pleaded guilty the day his trial was to begin, which indicates that his plea "was more likely the result of pragmatism than acceptance of responsibility and remorse." Davies v. State, 758 N.E.2d 981, 987 (Ind. Ct. App. 2001) (quotations omitted), trans. denied.

Additionally, Shinabarger's statements at the sentencing hearing indicated that his remorse was, at best, equivocal. A number of Shinabarger's statements expressed more concern about his daughter and fiancée than the victims of his carjacking. Specifically, Shinabarger qualified his expressions of remorse in stating:

> I was going through a bunch of situations actually kind of personal . . . I was reacting. All I thought about was my daughter's first birthday and how much I messed up and I guess I just . . . I was willing to do everything and anything to get to her, but I kind of did it in the wrong way . . . I mean at the moment of everything that happened, I wasn't even thinking straight. I didn't have my head on right. I was just kind of dazed and confused . . . I was just thinking out of instinct and reaction. I didn't intend on any of this happening. It was a spur of the moment thing. It's kind of like you put drugs in front of a doper, you know they're gonna [sic] take it.

Id. at 27-29. In sum, Shinabarger portrays himself as the victim in his statements at the sentencing hearing. We cannot say that the trial court abused its discretion in not identifying Shinabarger's proposed mitigators or in its identification of the aggravators used to enhance Shinabarger's sentence.

Issue Two: Appropriateness of Sentence

Shinabarger also contends that his sentence is inappropriate in light of the nature of the offense and his character. We exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial bench in making sentencing decisions. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. This court will only "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

The sentence imposed by the trial court is not inappropriate in light of the nature of the offenses. Shinabarger escaped and, after escaping, committed the carjacking. Shinabarger used force against the couple involved in the carjacking before abandoning them. Moreover, the trial court likened the carjacking to a kidnapping, which is a crime of violence under Indiana Code Section 35-50-1-2(a)(7). Shinabarger threatened the couple and claimed to have a gun, which placed them in fear for their safety. Hence, the crime was violent in nature.

The sentence also is not inappropriate in light of the character of the offender. Shinabarger escaped incarceration and committed a carjacking. Moreover, Shinabarger

has an extensive criminal history that started at an early age and included two charges of Robbery, one as a Class B felony and one as a Class C felony; one charge of Burglary, as a Class B felony; one charge of Theft, as a Class D felony; as well as a substantial number of misdemeanors and juvenile adjudications. Shinabarger's extensive criminal history and active avoidance of the penal system reflects poorly on his character. Nor are we persuaded that the proposed mitigators reflect positively on his character, as discussed above. Thus, the sentence imposed by the trial court is not inappropriate in light of the nature of the offenses and the character of the offender.

Affirmed.

RILEY, J., and BARNES, J., concur.